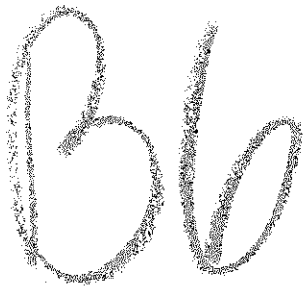

U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: JAN 13 2003

IN RE: Petitioner: [redacted]
Beneficiary

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Heyward

for Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability or as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director did not contest that the petitioner qualifies for classification but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in engineering from South China University of Technology. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree.

It appears from the record that the petitioner also seeks classification as an alien of exceptional ability. This issue is moot, however, because, as stated above, the record establishes that the petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term 'national interest.' Additionally, Congress did not provide a specific definition of 'in the national interest.' The Committee on the

Judiciary merely noted in its report to the Senate that the committee had 'focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .' S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the 'prospective national benefit' [required of aliens seeking to qualify as 'exceptional.'] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term 'prospective' is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, cancer research. The director appears to question whether the petition meets the second prong set forth in Matter of New York State Dept. of Transportation, noting that the record contains information regarding the importance of the field of research, but not the petitioner's contributions to that field. We find that such concerns are more appropriately discussed in the context of the final prong. The *proposed* benefits of the petitioner's work, improved prevention and treatment of cancer and viral infections, would clearly be national in scope. Thus, we find that the petitioner meets the second prong. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual

significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Id. at 219, note 6.

The petitioner submits several reference letters in support of the petition. [redacted] in whose laboratory the petitioner works at the M.D. Anderson Cancer Center at the University of Texas, asserts that he hired the petitioner over 200 other applicants for the post-doctoral fellow at the M.D. Anderson Cancer Center (the largest cancer center in the world), a position advertised in *Science*. Dr. Wilkinson summarizes the petitioner's projects as follows:

> (1) [H]e has investigated the underlying mechanism of a genetic surveillance pathway, called nonsense-mediated decay (NMD), that detects genetic errors called premature termination codons (PTCs), (2) he has elucidated the molecular mechanism for a related pathway, called nonsense-mediated upregulation (NMU), that corrects these genetic errors, (3) in work recently submitted for publication, he discovered a novel effect of PTCs in the nucleus of human cancer cells; he showed that PTCs inhibit the slicing of pre-mRNA, the expressed form of genes, and (4) he developed a new method of mutagenesis (the generation of mutations in DNA) that we recently licensed to a biomedical company and have submitted for publication.

[redacted] elaborates that the petitioner's discovery that NMD involves the nucleus "has the potential" to change traditional notions of the regulation of gene expression as previous studies suggested a cytoplasmic mechanism. The record does include evidence reflecting that the petitioner is listed as co-inventor on the patent. Matter of New York State Dept. of Transportation, however, specifically states that an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Id. at 221, note 7. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. The record does not include letters from the biomedical company that licensed the petitioner's invention attesting to its significance and explaining how it has helped the company. In fact, the M.D. Anderson Cancer Center advised the petitioner on September 6, 2000, that it would not exploit its interest in the invention. The center's release of its ownership of this intellectual property suggests the center's doubts as to the marketability of the invention.

In addition, [redacted] predicts that the petitioner's work with NMU will also alter traditional views of gene expression and constitutes a significant contribution to the area. [redacted] states that this work is being resubmitted for publication in *Nature*. We note that the record includes a letter from the research editor for *Nature* who states:

> As you will see, although the reviews are mixed[,] a number of questions have been raised that cast doubt on the strength of the conclusions that can be drawn at this stage. Most importantly, referee #2 is concerned that for the experiments performed in vitro, the manuscript does not show inhibition of the catalytic

> activity of polyclonal antibodies with an original transition state analogue, to verify the specificity of the reaction. In addition, there is not data on antibody titer or concentration in sera of the mice immunized with TSA. And finally, it is important to show that the reduced toxicity is due to antibody catalysis, not just binding.
>
> Although I may be willing to consider a revised manuscript that addresses the issues raised, I would understand if you felt that this would require unrealistic amounts of work. To address the criticisms will necessitate the inclusion of additional experimental data.

The petitioner also submitted the reviews. While the reviews do state that the conclusions would be a major achievement in the field, both reviewers find insufficient evidence to support the conclusions. Specifically, one reviewer states, "the data is not convincing and there are other possible explanations for the observations made which do not appear to have been addressed." Without evidence that *Nature* has now accepted the petitioner's revised manuscript, we cannot conclude that the concerns of the "two leading scientists" who reviewed the initial manuscript have been satisfactorily addressed.

Further, [redacted] asserts that the petitioner's work with PTC has suggested that a signal "known to be recognized by the translation machinery in the cytoplasm . . . is likely to also be recognized in the nucleus (where pre-mRNA splicing occurs)." Finally [redacted] asserts that the petitioner "invested an efficient site-directed mutagenesis method for large plasmid . . . that simplified the procedure and is considerably less expensive than the commercial kit." Dr. Wilkinson states that the M.D. Anderson Cancer Center has applied for a license for this technique and that three companies have expressed interest. Once again, the record does not contain letters from the three companies confirming their interest and explaining the significance of the technique.

In a new letter written in response to the director's request for additional documentation, Dr. [redacted] asserts that the petitioner plays a leading role in research funded by the National Institutes of Health (NIH) and the National Science Foundation (NSF). [redacted] summarizes the petitioner's work, some of which is reiterating the information provided previously while other language discusses the work the petitioner has done since the date of filing, including new presentations and published articles. We note that accomplishments after the date of filing cannot establish the petitioner's eligibility at that time. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

In response to the director's request for additional documentation, the petitioner submitted a letter from [redacted] organizer of the Texas Medical Center RNA Group Seminar Series. [redacted] asserts that he invited the petitioner to present his work on nonsense codons and RNA splicing in November 2000 [redacted] reiterates that this work is being resubmitted to *Nature* with new data to address the problems noted by the reviewers of the petitioner's previous manuscript. As stated above, the record contains no evidence that the revised

manuscript has been accepted by *Nature*. letter is not evidence that the petitioner has influenced his field beyond the Houston area.

In another letter submitted in response to the director's request for additional documentation, Dr. a professor at the University of Texas, Houston, and collaborator of Dr. indicates that the petitioner has contributed to his field and that his work "has a strong potential to benefit the people of the U.S. as a whole." He further asserts that the petitioner's innovative abilities and creativity cannot be expressed on a labor certification.

who works in the laboratory next collaborator and whose laboratory at Brandeis University collaborates on a joint project with provide similar information. In a letter submitted in response to the director's request for additional documentation, the chair department Ananthaswamy, chronicles the petitioner's education and career. provides similar information to that discussed above, asserting work on NMD is "at the center of this exciting field" and that the petitioner "plays a critical and indispensable role" on this project.

in whose laboratory the petitioner worked at the University of California, Berkeley, discusses the petitioner's work on a project involving nucleic based ligands, isolated ligands that bind human cytomegalovirus (HCMV) and block its infection writes:

> [The petitioner] results provide the first direct evidence that novel antiviral RNA ligands can be generated to block the entry and infection of a human virus. The selection procedures can be generally used to isolate new RNA ligands to bind and neutralize any human viruses or infectious pathogens. The results will be published in RNA (in press, [the petitioner] is the first author), a leading professional journal in molecular biology. Based on this invention we have applied for a patent ([the petitioner] served as the second inventor) entitled: "Polynucleotide ligands as anti-virus agents[.]" I believe it is a very significant contribution to the therapy of viral infection.
>
> Another significant impact [the petitioner] has made in my laboratory involved a project to inhibit viral gene expression by EGS-directed human ribonuclease P. and conventional antisense molecules have been shown to be promising antiviral agents for inhibition of viral gene expression and replication. Clinical trials are currently being carried out to use antisense molecules and ribozymes for therapy for HIV and HCMV infections. However, the intracellular efficacy of these gene-targeting agents is primarily dictated by their stability, catalytic activity. Therefore, the treatment does not always correlate with their in vitro catalytic efficiency.

[redacted] formerly a graduate student researcher in [redacted] laboratory while the petitioner was working there, provides similar information to that provided by [redacted] In addition [redacted]

> [The petitioner's] discovery [that certain RNA ligands can bind to the human cytomegalovirus (HCMV) and prevent viral infection] is an extremely significant one and has established a solid foundation for a general methodology that can be used to inhibit other viral infections using RNA ligands. . . . The results of [the petitioner's investigation of the efficiency of RNA external guide sequences (EGS) in targeting herpes simplex virus 1] have already been published and this paper is considered one of the original studies that show the utility of EGS's in gene targeting applications.

[redacted] reiterates his praise in a new letter submitted in response to the director's request for additional documentation [redacted] a postgraduate researcher [redacted] laboratory, provides similar information to that quoted above.

[redacted] a professor at the University of San Francisco and program director for the China Exchange, asserts that he met the petitioner while lecturing at Jinan University where the petitioner was a student. He provides similar information to that discussed above. [redacted] does not indicate that the petitioner's work has influence[redacted] own projects. In fact, we note that [redacted] current research concentrates on heavy metals in animals and the origin of marine animals in the Cambrian Period.

[redacted] the petitioner's professor at South China University of Technology, writes:

> Under my guidance and encouragement, [the petitioner] designed and synthesized a phosphate immunogen which was used for the first time to raise polyclonal antibodies with high catalytic activity for hydrolysis of insecticide carbaryl. The animal experiment showed that the mouse polyclonal antibody raised by the synthesized immunogen could degrade insecticide in vitro. [The petitioner's] result provided the first evidence that active immunization generates antibodies possessing therapeutic catalytic function in vivo.

[redacted] chairman of the petitioner's department at Jinan University in China, notes that the petitioner received competitive grants and received a Research Excellence Award from Jinan University. [redacted] then discusses the two projects for which the petitioner was the principal researcher, including the petitioner's work with polyclonal antibodies that [redacted] asserts was cited three times in *Chemical Abstracts* [redacted] continues:

> In order to develop effective methods to get rid of the waste shrimp shells and protect the environment, [the petitioner was] involved [in] another interesting project: preparation of shrimp-flavor soy sauce by hydrolyzed shrimp shells with bio-technique.

[redacted] asserts that "three papers have been published about this project" and that the research will help improve the environment and allow for more efficient use of natural resources.

The petitioner submits several of his published articles and five articles submitted to various journals. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community's reaction to those articles.

The petitioner submitted evidence that his article in *RNA* was cited twice, his article in *Enzyme and Microbial Technology* was cited once, and his article in *Steroids* was cited once. The petitioner did not submit a list of the articles. As such, it is unknown whether any of these citations were by independent researchers in the field, as opposed to self-citations.

The petitioner also submitted copies of pages from *Chemical Abstracts*. Counsel asserts that this journal is a publication "in which [the petitioner's] published papers are cited and collected." The title page of the publication states:

> It is the careful endeavor of Chemical Abstracts to publish adequate and accurate abstracts of all scientific and technical papers containing new information of chemical or chemical engineering interest and to report new chemical information revealed in patent literature.

While the petitioner's published articles are referenced in this publication, since the publication attempts to provide abstracts of all published original research,[1] the appearance of the petitioner's published articles is not significant. The references to the petitioner's articles do not indicate how often or even if the petitioner's articles have been cited by other researchers in their own articles.

The petitioner submitted newly published and submitted articles in response to the director's request for additional documentation. This evidence does not establish the petitioner's eligibility at the time of filing. See Matter of Katighak, supra.

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[1] The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field.

The petitioner also submitted evidence of his professional memberships, scholarships and awards. The record contains no evidence that the professional associations of which the petitioner is a member are exclusive. We note that the Association for the Advancement of Science has over 143,000 members and the American Society of Biochemistry and Molecular Biology, of which the petitioner is only an associate member, has over 10,000 members. While the scholarships and awards reflect well on the petitioner's abilities, recognition by one's peers is simply one possible requirement for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one requirement, or even the requisite three requirements, for this classification qualifies one for a waiver of the labor certification process. See generally Matter of New York State Dept. of Transportation, supra, at 218-219.

The petitioner submits materials from Biowire.com, for which counsel asserts that the petitioner was "invited" as a reviewer. The Internet materials submitted indicate that the petitioner has written eight reviews, two of which have been read a total of four times. While the petitioner's reviews all have five star ratings, we note that even the reviews that have not been read have such ratings. A review of the materials provided suggests that Biowire.com is similar to a newsgroup for scientists rather than a prestigious organization that "invites" the top members of the field to provide reviews.[2]

In response to the director's request for additional documentation, the petitioner submitted grant applications completed by Dr. Wilkinson. It is noted that the petitioner is not identified as a principal investigator or even as one of the key personnel.

The director concluded that the petitioner had not established that he played a key role on his projects. Counsel challenges this conclusion and we agree that, despite the petitioner's omission from the grant proposals, the letters from the petitioner's collaborators establish his contributions to the projects on which he has worked. In addition, the record contains an e-mail from Dr. Moore to other collaborators advising that the petitioner would be upgraded to a contributing author on one article given the importance of his data.

The director also concluded, however, that the petitioner had not demonstrated his impact on the field nationally. Counsel asserts on appeal that the record contains five letters from entities other than the M.D. Anderson Cancer Center and the University of California. The five letters referenced by counsel, however, do not come from entirely disinterested, independent experts in the field. One of these letters is from one of the petitioner's instructors in China, Dr. Chien, who works in a different area than the petitioner does. Two of these letters are from collaborators. Specifically, Dr. Kilani collaborated with the petitioner at UC Berkeley before going to work at Bio-Rad and Dr. Moore works at a laboratory that collaborates with Dr. Wilkinson on the

[2] A review of the website reveals that users of the site register to give reviews. The "About Biowire - Terms of Service" section does not indicate that Biowire.com solicits reviewers, rather, any registered user can post reviews. While the service is restricted to scientists, it is not contested that the petitioner in this case is a scientist.

petitioner's project. The final two letters are from researchers in Houston, where the petitioner works. In addition, [redacted] do not indicate that the petitioner has influenced their personal research. None of these five letters is evidence of the petitioner's influence beyond his immediate colleagues or the Houston area.

While letters from collaborators and researchers in one's geographic area are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole.

Counsel also refers to "reprint and advice" requests as evidence of the petitioner's influence. On appeal, the petitioner does submit several e-mail requests for technical advice and reprint requests addressed [redacted] The e-mails are all from a single researcher at the University of Kentucky. The reprint requests indicate that researchers are interested in the subject of the petitioner's articles, but are not necessarily evidence of the articles' influence. For a researcher to be influenced by the petitioner's work, he would have to read and apply the results, which would lead to citations by the researcher in his own articles. As stated above, the record contains evidence that three of the petitioner's articles had been cited as of the date of filing, each article cited no more than two times in unidentified articles. Two citations for an article is not evidence that the article is widely cited or influential. On appeal, the petitioner submits evidence that his article published in *RNA* was cited an additional three times, for a total of five citations. Five citations are still not remarkable.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor and that his results, if true, have the potential to lead to new prevention and treatment methods. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. At best, the instant petition appears to have been filed prematurely, before the petitioner's most significant results, according to his collaborators, were published in *Nature* (or another peer-reviewed journal if *Nature* once again declines). Even on appeal, there is no indication that the petitioner's revised manuscript has been accepted by *Nature*. Even after acceptance, the petitioner would need to demonstrate that the article had been cited a significant number of times to demonstrate its influence.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

[redacted]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.